

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia -

APRIL TERM, 1909.

No. 2016.

595

BENJAMIN F. LEIGHTON, IRWIN B. LINTON, TRUSTEES,
APPELLANTS,

vs.

NORRIS MacDANIEL, EXECUTOR OF MARY MacDANIEL,
DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED APRIL 29, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2016.

BENJAMIN F. LEIGHTON ET AL., Appellants,

vs.

NORRIS MACDANIEL, Executor, &c.

a Supreme Court of the District of Columbia.

Equity. No. 27940.

NORRIS MACDANIEL, Executor of Mary MacDaniel, Deceased,
Complainant,

vs.

W. HENRY WALKER, Trustee; WILLIAM E. EDMONSTON, Trustee;
IRWIN B. LINTON, Trustee; BENJAMIN F. LEIGHTON, Trustee;
ANTIONETTE L. HILL, REDFORD W. WALKER, MARY CUSHING,
ADELAIDE MANSUR, JARED D. TERRILL, EMMA J. HILDRUP, E. W.
PIPER, ROSINA M. PARNELL, FLORA H. BARTON, WILSON D.
WING, ISABELLE VARNEY, ELIZABETH VARNEY, GEORGIA B. DEN-
ISON, JOHN IRWIN, KATHARINE S. FOOS, WILLIAM E. EDMON-
STON, FRANCIS G. TERRILL, GEORGE S. VAN SICKLE, MARY L. S.
SUTTON, and ALBERT S. YOUNG, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of
Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had in the above-entitled cause, to wit:—

Filed July 17, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27940.

NORRIS MACDANIEL, Executor of Mary MacDaniel, Deceased,
Complainant,

vs.

W. HENRY WALKER, Trustee; WILLIAM E. EDMONSTON, Trustee;
IRWIN B. LINTON, Trustee; BENJAMIN F. LEIGHTON, Trustee;
ANTIONETTE L. HILL, REDFORD W. WALKER, MARY CUSHING,
ADELAIDE MANSUR, JARED D. TERRILL, EMMA J. HILDRUP, E. W.
PIPER, ROSINA M. PARNELL, FLORA H. BARTON, WILSON D.
WING, ISABELLE VARNEY, ELIZABETH VARNEY, GEORGIA B. DEN-
ISON, JOHN IRWIN, KATHARINE S. FOOS, WILLIAM E. EDMON-
STON, FRANCIS G. TERRILL, GEORGE S. VAN SICKLE, MARY L. S.
SUTTON, and ALBERT S. YOUNG, Defendants.

To the Supreme Court of the District of Columbia, holding an
Equity Court:

Complainant states as follows:

1. That he is a resident of the District of Columbia, and brings
this suit in his capacity as executor of Mary Macdaniel, de-
2 ceased, he having been duly appointed as such by this court,
holding a Probate Court, and having duly qualified and
received letters testamentary.

2. The defendants, W. Henry Walker, William E. Edmonston,
Irwin B. Linton and Benjamin F. Leighton are also residents of said
District, and are sued as Trustees as hereinafter stated; the defend-
ant Edmonston, is also sued in his own right. The remaining de-
fendants are all sued in their own right, and the defendant, Emma
J. Hildrup is also sued as Trustee for her co-defendant, E. W. Piper,
as hereinafter stated. The residences of the defendants, so far as
complainant has been able to ascertain the same, are as follows:
The defendant Hill, Manchester, New Hampshire, the defendant
Redford W. Walker, Baltimore, Maryland, the defendant, Jarid D.
Terrill, Havana Cuba, the defendants Emma J. Hildrup and E. W.
Piper, Raleigh, North Carolina, the defendant Barton, Manchester.
New Hampshire, the defendant Wing, Bangor, Maine, the defendant
Francis G. Terrill, Northfield, Massachusetts, the defendant Van
Sickle, Salem, Michigan, the defendant Sutton, Port Chester, New
York, the defendant Young, Fairfield, Illinois, and the remaining
defendants in the District of Columbia, except the defendant Mansur
who is believed to be a non-resident.

3. By a deed of trust, dated November 25, 1892, and recorded
November 26, 1892, in Liber No. 1760 folio 99 *et seq.* of the Land
Records of the District of Columbia, reference to which is here made

as a part of this bill, Redford W. Walker with his wife, Phebe A. Walker, conveyed to the defendants, William E. Edmonston and W.

3 Henry Walker, certain real estate in said District, to secure the payment of a debt due by said Redford W. Walker to Mary Macdaniel, complainant's testatrix, amounting to \$21,000, evidenced by the five promissory notes of said Walker, bearing even date with said trust, numbered from one to five, each for the sum of \$4,200 and payable to the order of said Mary Macdaniel, respectively, in two, three, four, five and six years after date, with interest at the rate of six per cent. per annum, payable semi-annually. The real estate conveyed by said deed is described therein as follows:

Part of a tract of land known as "Queensborough" or "Inclosure" described by metes and bounds as follows: Beginning for the same at a stone at North-east corner of lot numbered Eleven (11) in the division of part of said tracts as per plat recorded in the Surveyor's Office of the District of Columbia in County Book Governor Shepherd page 151 and running thence with East line of said lot South Thirty-five and $\frac{1}{4}$ ($35\frac{1}{4}$) degrees East Ninety-two and $\frac{40}{100}$ ($92.40/100$) perches to a Stone in outline of tract and thence with said outline North Forty-six and $\frac{3}{4}$ ($46\frac{3}{4}$) degrees East Twenty-seven and $\frac{56}{100}$ (27.56) perches to a stone North Thirty-seven and $\frac{1}{4}$ ($37\frac{1}{4}$) degrees East Twenty and $\frac{44}{100}$ (20.44) perches to the South-west corner of land conveyed to Heider by deed recorded among the Land Records of the District of Columbia, in Liber 1097 folio 440, thence with said Heider's land North Fifty-nine and $\frac{3}{4}$ ($59\frac{3}{4}$) degrees West Forty-eight and $\frac{30}{100}$ (48.30) perches, thence North Twenty-nine and $\frac{1}{2}$ ($29\frac{1}{2}$) degrees West Thirty-nine and $\frac{40}{100}$ (39.40) perches to South side of Brentwood or Bladensburg Road and thence with South side
4 of said road, South Forty-six and $\frac{3}{4}$ ($46\frac{3}{4}$) degrees, West Thirty-two and $\frac{88}{100}$ (32.88) perches, South Fifty-nine and $\frac{1}{4}$ ($59\frac{1}{4}$) degrees West Eleven and $\frac{80}{100}$ (11.80) perches to the place of beginning.

4. Thereafter by deed, dated December 21, 1892, and recorded December 22, 1892, in Liber No. 1764 folio 132 *et seq.* of said Land Records, reference to which is here made as a part of this bill, said Redford W. Walker and his wife, conveyed the real estate described in the third paragraph of this bill, subject to said deed of trust of November 25, 1892, to William O. Dennison and George H. Baldwin, in trust for the benefit of certain persons who had contributed to the purchase money of said real estate, and with power to subdivide the tract and sell and convey the same.

5. Note numbered one, described in said trust of November 25, 1892, was paid to said Mary Macdaniel, in her life-time, in the following instalments: December 7, 1894, \$3460.52, February 5, 1895, \$214.24, and January 13, 1896, \$525.24. Payments, aggregating \$2,015.56, on account of note numbered two, also described in said deed of trust, were made to said Mary Macdaniel, in her lifetime, in the following instalments: February 5, 1896, \$273.51, July 7, 1896, \$850, July 15, 1896, \$200 and August 25, 1904, \$692.05, so that

the balance due on said original debt of \$21,000, is the principal sum of \$14,784.44, with interest thereon at the rate of five per cent. per annum (the interest having been reduced to that rate August 22, 1904) from November 25, 1907, made up as follows: Balance on note numbered two \$2,184.44, and notes numbered three, 5 four and five each for \$4,200.

6. On August 22, 1904 by a writing annexed to said notes, signed by complainant's testatrix and William O. Dennison, the maker thereof, Redford W. Walker, was discharged from liability thereon, and payment thereof assumed by said Dennison, and at the same time, the time of payment of said notes was extended to November 25, 1907.

7. Said deed of trust of November 25, 1892, referred to in the third paragraph of this bill, has indorsed thereon the following: "I consent to provisions of the foregoing deed of trust." Mary Macdaniel," and one of the provisions thereof is as follows: "With privilege of paying any part of any of said notes at any time before maturity thereof, provided any payment so to be made shall not be less than \$500.00 except where the payment is for the balance due on either of said notes. It being agreed that whenever any part of the principal of said notes shall be paid the said Redford W. Walker, his heirs or assigns shall be entitled to have released from the operation and effect of these presents such part or parts of the hereinafter described parcel of land as shall bear the same proportion to the whole of the said land, then subject to these presents, as the amount paid on said principal shall bear to the whole principal of said debt then remaining unpaid, and further that upon a *pro rata* payment being made upon all streets, roads or ways of any subdivision made by said Redford W. Walker, his heirs or assigns and duly approved by the Commissioners for the time being of the District of Columbia, the parties hereto of the Second part, shall unite in such 6 sub-division, and releases shall be thereafter made according to such sub-division."

8. By deed of release, dated January 5, 1900, and recorded among said Land Records, in Liber No. 2467 folio 408, said Trustees, Edmonston and Walker, with the assent of said Mary Macdaniel, released from said trust of November 25, 1892, the following part of the real estate thereby conveyed: All that part thereof which is designated as Rhode Island Avenue as proposed to be extended by the Commissioners of the District of Columbia, as per plat on file in their office and in the Surveyor's office of said District, lying between the lines of said Rhode Island Avenue as shown on said plat.

By deed of release, dated February 9, 1904, and recorded among said Land Records in Liber No. 2798 folio 169, said Trustees, with the like assent, released from said trust, the following part of the tract thereby conveyed: Beginning at the South-east corner of Galveston Street (as then known) and Sixteenth Street, extended thence East 20 feet, more or less, to the Heider line, thence South along the line dividing the Macdaniel tract and the Heider tracts of land, 120 feet, more or less, to the North line of Rhode Island Avenue, extended, thence South-west along the line of said Avenue, 100 feet,

more or less, to the East line of 16th street, thence North 150 feet, more or less, to the place of beginning, (being all that parcel of land bounded by Rhode Island Avenue, Sixteenth Street and Galveston Street (as then known) and Heider and Macdaniel's line, formerly known as part of "Queensborough" and "Inclosure." The Streets above indicated being proposed Streets, at the date of said release, under the plan of the extension of Streets.

7 9. On January 17, 1907, Redford W. Walker and eleven other persons, filed a bill in this Court, Equity No. 26,817, against George H. Baldwin, the surviving trustee, under the deed mentioned in the fourth paragraph of this bill (his co-trustee, William O. Denison, having died), and seven other persons, said complainants and the defendants, other than said George H. Baldwin, being the persons who contributed to the purchase of said real estate and all being defendants hereto, setting up said deed in trust of December 21, 1892, the death of said Denison, intestate, showing the interest of the respective members of the syndicate, and praying an account from the defendant to said suit, Georgia G. Denison, the devisee of said William O. Denison, and for a decree appointing trustees in lieu of those named in said deed in trust of December 21, 1892. Such proceedings were had in said case that on July 17, 1907, a decree was passed therein, appointing the defendants, hereto, Benjamin F. Leighton and Irwin B. Linton as Trustees under said last mentioned deed in trust in the place and stead of the Trustees therein named and vesting said substituted trustees with all the power and authority theretofore vested in their predecessors.

All of which will more fully and at large appear by reference to the proceedings in said cause, which are prayed to be read and considered as a part of this bill.

10. Shortly after his qualification as executor, complainant coming into possession of said notes as part of the assets of said estate, undertook, as his duty required, to collect the same, and being
8 unable to do so, in the month of May 1908, gave to the defendants, Edmonston and Walker, the Trustees under said deed of trust referred to in the third paragraph of this bill direction, in writing, to proceed to sell the tract thereby conveyed, excepting therefrom the two parcels so as aforesaid released, and requested said Trustees to sign an advertisement of sale, the copy whereof is annexed hereto, as a part of this bill, but said Trustees declined to sign said advertisement or make said sale, for the reason that they had been notified by said substituted trustees, Linton and Leighton, that the latter claimed to be entitled to the release of part of said tract in addition to the two parcels formerly released, in consequence of the payment of said note numbered one and the partial payment of note numbered two, under the provision for partial release contained in said deed of trust, and set forth in the seventh paragraph of this bill, and said Edmonston and Walker, in addition to said notice, were formally warned, in writing, by said Linton and Leighton, not to make any sale until the question as to said release was settled.

Complainant is informed by said Linton and Leighton, that said

notice had in fact been given, and that they claim the release of about six additional acres of said tract by reason of said partial payment.

11. Complainant, under the advice of counsel, declined to authorize such release, and avers, upon information and belief, that the said substituted Trustees are not entitled to the same for the reasons, among others, that only the two releases, hereinbefore recited, were

9 asked for prior to the maturity of all of said notes, and that the duty now devolves upon said substituted Trustees to pay said debt whereupon they will be entitled to a release of all of said tract now remaining subject to the lien of said trust, and complainant states the fact to be that since the making of said deed of trust a plan for Street extensions has been adopted, which greatly diminishes the area subject to said trust, although the Streets proposed have not yet been laid out or opened, except as to Rhode Island Avenue, and it is impossible, owing to the situation of the property, to determine under the language of said deed of trust, what portion of said tract should be released or from what part of it the parcel should be taken. The provision for partial releases contained in said trust of November 25, 1892, requires the grantor therein, in case of sub-division of said tract, to make *pro rata* payment upon all Streets, roads or ways that may be established by said sub-division, and complainant charges that the area of Streets as shown by said extension plan, which are sure to be taken, ought in Equity to be paid for by the present owners of said property, and this liability on their part, aside from any other reason, disentitles them to any further release.

12. Complainant avers that the persons referred to as contributors to the purchase-money of the tract hereinbefore described, in the deed in trust of December 21, 1892, set up in the fourth paragraph of this bill, and their assignees, are the real owners of said property, and that at the date of said deed the amount advanced for that purpose was \$31,000, divided into thirty-one equal parts, and certi-

10 cates were issued for said parts, and that such certificates are now held by the defendants hereto in the following proportions: The defendant Hill, five shares, the defendant Redford W. Walker, three shares, the defendant Cushing, two shares, the defendant Mansur, two shares, the defendant Jared D. Terrill, two shares, the defendant Denison, three shares, the defendant Foos, one share unless, as complainant believes the fact to be, she has assigned the same to said Denison, and the defendants Young, Sutton, Van Sickle, Francis G. Terrill, Edmonston, Irwin, Elizabeth Varney, Isabelle Varney, Wing, Barton and Parnell each one share, and the defendant Hildrup one share in her own right and one as Trustee for the defendant Piper.

13. Complainant is advised and avers that as it is impossible for him to obtain a sale of said real estate, under the deed of trust aforesaid, he is entitled to the fore-closure of the same by decree of this Court and to a decree for the sale thereof for the satisfaction of the balance due on said notes, as to which there is no dispute, by Trustees appointed for that purpose, with authority to said Trustees to have said property surveyed, and if necessary sub-divided.

14. Complainant avers that it may be better for the interest of all concerned that the question as to the right of the defendants for a further release be reserved until after such sale, for the proceeds thereof may be in an amount sufficient to render any decision on said point unnecessary.

11

Prayers.

Wherefore, complainant prays as follows:

1. That a decree may be passed for the foreclosure of said deed of trust and directing the sale of the real estate now remaining of record subject to the lien thereof, by Trustees appointed for that purpose, for the satisfaction of the balance due on said notes, the costs of sale, any taxes that may be due and the expenses of this cause. That by such decree the Trustees so appointed may be authorized to have a survey made of said property to determine what remains after the exclusion of the two parcels hereinbefore shown to have been released, with authority, if deemed expedient, to sub-divide the tract so found to remain, and that out of the proceeds the debt and interest due complainant may be satisfied.

2. That the question as to the right of the defendants to further release of any part of said property may be determined in and by said decree, or reserved for further decision as suggested in the fourteenth paragraph of this bill.

3. That complainant may have such other and further relief as the nature of the case may require.

To which end complainant prays for process against the defendants named in the caption hereto, as fully as though their names were here repeated, requiring them to appear and answer the exigency of this bill.

IRVING WILLIAMSON,
Sol'r for Comp't.

12 DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing bill, by me subscribed, and know the contents thereof, and that the facts therein stated, upon my personal knowledge, are true, and those therein stated, upon information and belief, I believe to be true.

NORRIS MACDANIEL.

Subscribed and sworn to before me this 17th day of July, 1908.

JOHN R. YOUNG, *Clerk*,
By J. W. PALMER, *Ass't.*

EXHIBIT TO BILL.

Trustees' sale of valuable tract of land, containing about twenty three acres, lined on both sides of Rhode Island Avenue, extended, and bounded on the East and West by ——— and ——— Streets Northeast, as proposed.

By a virtue of a deed of trust duly recorded in Liber No. 1760, folio 99 *et seq.*, of the Land Records of the District of Columbia, and at the written request of the party thereby secured, we will sell, at public auction, in front of the premises, on the — day of May, 1908, at Five o'clock, P. M., the following described land situated in the County of Washington, District of Columbia, and designated

13 as and being part of a tract of land known as "Queensborough" or "Inclosure," described by metes and bounds as follows: Beginning for the same at a stone at Northeast corner of lot numbered 11 in the division of part of said tracts as per plat recorded in the Surveyor's Office of said District, in County Book Governor Shepherd page 151, and running thence with East line of said lot South 35 and $\frac{1}{4}$ degrees East 92.40/100 perches to a stone in outline of tract and thence with said outline North $46\frac{3}{4}$ degrees, East 27.56/100 perches to a stone North $37\frac{1}{4}$ degrees East 20.44/100 perches to the South-west corner of land conveyed to Heider by deed recorded among the Land Records of the District of Columbia in Liber 1097 folio 440, thence with said Heider's land North $59\frac{3}{4}$ degrees West 48.30/100 perches, thence North $29\frac{1}{2}$ degrees West 39.40/100 perches to South side of Brentwood or Bladensburg Road, and thence with South side of said road South $46\frac{3}{4}$ degrees, West 32.88/100 perches, South $59\frac{1}{2}$ degrees West 11.80/100 perches to the place of beginning, excepting therefrom the following described part of said tract which was released therefrom by deed recorded in Liber No. 2467, folio 408 of said Land Records, namely, all that part of the above described plat which is designated as Rhode Island Avenue as proposed to be extended by the Commissioners of the District of Columbia, as per plat on file in their office and in the Surveyor's Office of said District, lying between the lines of said Rhode Island Avenue, as shown on said plat, and also excepting therefrom the following described part of said tract which was released from said trust by a deed recorded

14 in Liber No. 2798 folio 169 of said Land Records, namely: Beginning at the South-east corner of Galveston Street (as then known) and Sixteenth Street, extended, thence East 20 feet, more or less, to the Heider line, thence South along the line dividing the Macdaniel tract and the Heider tracts of land, 120 feet, more or less, to the North line of Rhode Island Avenue, extended, thence South-west along the line of said Avenue 100 feet, more or less, to the East line of Sixteenth Street, thence North 150 feet, more or less, to the place of beginning, (being all that parcel of land bounded by Rhode Island Avenue, Sixteenth Street and Galveston Street (as then known) and Heider and Macdaniel's line,

formerly known as part of "Queensborough" and "Inclosure." The streets above indicated being proposed streets, at the date of said release, under the plan of extension of streets.

Terms: One third of the purchase money to be paid in cash, which a deposit of \$500 must be made at the time of sale, and the balance in equal installments in one and two years, with interest at six per cent, per annum, payable semi-annually, from day of sale, for which the notes of the purchaser would be taken, secured by a deed of trust upon the property sold, or all cash at the option of the purchaser. All conveyancing and recording at cost of purchaser. Terms of sale to be complied with within fifteen days from day of sale, otherwise the Trustees reserve the right to resell the property at the risk and cost of the defaulting purchaser, after five days' advertisement of such resale in some newspaper published in Washington, D. C.

15 *Answer of B. F. Leighton and Irwin B. Linton, Trustees.*

Filed October 8, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27940.

NORRIS MACDANIEL, Executor of Mary Macdaniel, Deceased,
Complainant,

vs.

W. HENRY WALKER, Trustee, *et al.*, Defendants.

Irwin B. Linton, Trustee, and Benjamin F. Leighton, Trustee, two of the defendants in the above entitled cause, for answer to complainant's bill of complaint, say:

1, 2, 3 and 4. Answering the first, second, third and fourth paragraphs of complainant's bill of complaint, these defendants admit the statements therein made to be substantially true as therein stated, and for the purposes of this suit, they are admitted.

5. Answering the fifth paragraph of complainant's bill of complaint, these defendants say on information and belief, that the total amount alleged to be due on the indebtedness secured by the deed of trust in said paragraph described, to wit, the sum of \$14,784.44, with interest from November 25th, 1907, at five per centum per annum, is the correct amount due upon said indebtedness. As to the dates and amounts of the partial payments made on account of said indebtedness, these defendants are not furnished with sufficient information as to the correctness of the state-
16 ments made in said paragraph of said bill, relating thereto; and while they have no reason to doubt the accuracy of said averments, they leave complainants to make such proof thereof as he may deem material.

6. Answering the sixth paragraph of complainant's bill of com-

plaint, these defendants say that they have no personal knowledge as to the truth of the facts stated in said paragraph of said bill; they therefore leave complainant to make such proof thereof as he may deem material.

7. Answering the seventh paragraph of said bill of complaint, these defendants admit that the said deed of trust, bearing date November 25th, 1892, referred to in the third paragraph of complainant's bill, was signed by the said Mary Macdaniel, and its provisions assented to by her, and that said deed of trust contained a clause for releases, on partial payments being made on said indebtedness. These defendants admit that the substance of said provisions is correctly stated in said paragraph of said bill, but for greater accuracy they prefer to rely upon the deed of trust itself; and in so far as said averments are contrary to, or differ from the provisions of said trust relating to releases, they are severally and specifically denied.

8. Answering the eighth paragraph of complainant's bill of complaint, defendants say that they have no personal knowledge as to the statements made in this paragraph of said bill, and while not doubting the truth or accuracy thereof, they leave complainant to make such proof thereof as he may deem material.

9. Answering the ninth paragraph of complainant's bill
17 of complaint, these defendants say that the statements therein contained are substantially true and are admitted.

10. Answering the tenth paragraph of complainant's bill of complaint, defendants say that they admit on information and belief that complainant gave notice to the defendants, Edmonston and Walker, trustees under the deed of trust in complainant's bill described, directing a sale of the property embraced in said deed of trust, as stated in said paragraph of said bill; they admit further that said trustees declined to sign said advertisement, or to make said sale, for the reasons stated in said paragraph of said bill. These defendants admit that they served notice in writing, upon said defendants, Walker and Edmonston, claiming a release of between five and six acres of the land embraced in said trust, by reason of the partial payments made on the indebtedness secured thereby.

11. These complainants for answer to the eleventh paragraph of complainant's bill of complaint, aver that they, as trustees, under the decree of this court, in Equity Cause No. 26,817, have succeeded to all the powers and duties conferred upon W. O. Denison and George H. Baldwin, trustees under the original deed in trust referred to in said bill. That as such trustees, they had the right, and it became their duty to demand of the defendants Walker and Edmonston, Trustees under the deed of trust hereinbefore referred to, a release of part of the land embraced therein, in accordance with the terms and provisions of said instrument, relating thereto; that they had the right, and it was their duty to make selection of
the parts or parcels of land to be released by said trustees,
18 Edmonston and Walker, under the provisions of said trust, as aforesaid. That pursuant thereto, they selected all of the

land lying north of Rhode Island Avenue, extended, containing 2.91 acres, and a strip lying immediately south of said Avenue, and abutting thereon, 160 feet in depth, by the full width of said tract, containing 2.57 acres. These two pieces, lying north and south of said Rhode Island Avenue, extended, as aforesaid, contain 5.48 acres, the exact amount which said trustees are entitled to have released. Defendants aver that the Act of Congress relating to the extension of public highways in the District of Columbia, passed subsequently to the date and delivery of said deed of trust, in nowise affected its interpretation. That if equities of the character suggested by complainant in this paragraph of his bill are to be considered, the fact that the syndicate paid to Miss Mary Macdaniel, the former owner of the property, and complainant's testatrix, the sum of \$31,000, in cash, the use of which she has had since the purchase of said property, together with the interest on the deferred payments, ought to be considered. These defendants aver, upon information and belief, that the price paid for said property, was in excess of its real value at the time of its purchase, and much more than could have been obtained for the property at any time since, and more than twice what it will bring in the market today. The other averments in said paragraph of said bill contained, are not statements of fact, but inferences drawn from complainant's interpretation of the provisions of said deed of trust under consideration, in respect to releases; and they are advised it is not

19 necessary or material for them to make any further answer thereto.

12. Answering the twelfth paragraph of complainant's bill of complaint, these defendants say that the averments made therein are substantially true, and for the purposes of this suit only, they are admitted.

13. Answering the 13th paragraph of complainant's said bill, these defendants admit the right of complainant to exhibit his bill in court, for the purpose of the foreclosure of said deed of trust, and the payment of the indebtedness now due thereunder. They deny, however, that it is necessary that trustees be appointed by the court, and state that it is entirely competent for the court to direct the trustees under said deed of trust, to execute said trust, either by sale of the property in bulk, or to make subdivision of said property, and sell the same in parcels after such subdivision.

14. Answering the fourteenth paragraph of complainant's said bill, defendants say that in their judgment, it is not in the interest of all concerned that the question of the right of defendants to a partial release, be reserved until after the sale of the property; they say that if the property be offered for sale, in the present condition of the market, it would probably bring the amount of the indebtedness due thereon, and nothing in excess thereof; that it is for the interest of defendants, as trustees of said syndicate, to have the part of the tract of land covered by the deed of trust, designated by them,

or such part as they may be entitled to, and such as may be designated and determined by the court, released from the effect and operation of said deed of trust, before any sale is made thereunder.

Having fully answered complainant's bill of complaint, these defendants pray to be hence dismissed with their reasonable costs in this behalf incurred.

BENJAMIN F. LEIGHTON, *Trustee*.
IRWIN B. LINTON, *Trustee*.

DISTRICT OF COLUMBIA, *To wit*:

Benjamin F. Leighton, Trustee, and Irwin B. Linton, Trustee, being first duly sworn, on oath say that they have read the foregoing answer by them subscribed, and know the contents thereof; that the facts therein stated of their own knowledge, are true, and those stated upon information and belief, they believe to be true.

BENJ. F. LEIGHTON, *Trustee*.
IRWIN B. LINTON, *Trustee*.

Subscribed and sworn to before me, this 7th day of Oct., 1908.

[SEAL.]

HARRY G. KIMBALL,
Notary Public, D. C.

21

Opinion.

Filed March 10, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27940.

NORRIS MACDANIEL, Executor of Mary Macdaniel, Deceased,
v.

WILLIAM HENRY WALKER, Trustee, *et al.*

The bill in this case is filed for the purpose of foreclosing a deed of trust dated Nov. 25, 1892, and recorded Nov. 26, 1892, in Liber 1760, Folio 99 *et seq.*, by which Redford W. Walker, and wife, conveyed to the defendants William E. Edmonston and William Henry Walker, certain real estate described, to secure the complainant's testatrix \$21,000, evidenced by five promissory notes of \$4,200 each, due in 2, 3, 4 5 and 6 years respectively, and bearing six per cent. interest. The land conveyed is a part of a tract known as "Queensborough," or "Inclosure," described by metes and bounds, and containing about 26 $\frac{1}{4}$ acres.

After executing the said deed of trust, the said Redford W. Walker and wife conveyed the said property, subject thereto, to William O. Denison and George H. Baldwin, in trust for the benefit of certain persons who had contributed to the purchase money of said real estate.

The first note secured by said trust matured Nov. 25, 1894, and sometime after maturity, the same was paid, in several installments.

22 The second note matured in 1895, and after its maturity, certain installments were paid thereon, leaving a balance of \$2,184.44; and the other three notes had no payments thereon except interest.

On August 22, 1904, the interest on the unpaid notes, then all overdue, was reduced to five per cent. and an extension given to November 25, 1907.

The defendants Benjamin F. Leighton and Irwin B. Linton, trustees, were substituted in place of the trustees named in the deed in trust executed by said Redford W. Walker and wife, by decree in Equity cause No. 26,817, the trustee William O. Denison having died.

By the terms of the said deed of trust, executed as aforesaid to secure Mary Macdaniel, the grantor had the privilege of paying any part of any of said notes at any time before maturity thereof, provided he paid not less than \$500 at a time, except when the balance on any note might be less than that; and on partial payments being made, it was agreed that said Walker, his heirs or assigns, should be entitled to have a proportional part of said land released from said trust.

Rhode Island Avenue it appears has been extended through this tract, and the ground taken therefor has been released, together with another small piece of ground north of said Avenue. That the complainant notified the trustees named in said deed of trust of the fact that the said notes were all overdue and unpaid, as aforesaid, in the month of May, 1908, and directed them to proceed

23 to sell the said tract for the payment of the said debt.

Thereupon the defendants Leighton and Linton, as trustees for the syndicate, made a claim for a release of a portion of said tract, in consideration of the partial payments made on the said debt, claiming the right to have released about six acres.

That by reason of said claim, which the complainant would not consent to, the said trustees were unable to proceed with the sale; and therefore this bill is filed, in order that the rights of the parties named be determined before a sale is attempted.

The prayers of the bill are for a foreclosure of the said trust; that the trustees appointed to sell be authorized to have a survey made, with authority to sub-divide if deemed expedient; that out of the proceeds of sale the debt unpaid shall be satisfied; that the right of the defendants to have any further release of said property may be determined or reserved; and that the complainant may have such other and further relief as the nature of the case may require.

The trustees who were substituted in place of William O. Denison and George H. Baldwin, are made parties defendant herein, as well as all the equitable owners or members of the syndicate represented by them, and the answers admit the substantial averments of the bill, namely, that there is now due on the said notes secured by the said deed of trust, the sum of \$14,784.44, with interest thereon at

the rate of five per cent. per annum from November 25, 1907. This is the exact amount of principal that was due when the contract of extension was made on August 22, 1904, no payments whatever having been made on the principal after that extension. The language of the contract of extension is as follows:

WASHINGTON, D. C., Aug. 22, 1904.

The time of payment of the note of Redford W. Walker in favor of Mary Macdaniel, payment of which has been and is hereby assumed by William O. Denison, for \$4,200, dated November 25, 1892, payable three years after date, and secured by a deed of trust on part of "Queensborough" and "Inclosure," District of Columbia, is hereby extended to November 25, 1907, with interest at the rate of five per centum per annum, payable semi-annually. Said note and the deed of trust securing the same, are to remain otherwise unqualified, and in full force, with the privilege of paying any or all of said note before maturity.

(Signed)

WILLIAM O. DENISON, *Payee.*
MARY MACDANIEL, *Holder."*

The identical contract is attached to each of the four notes now unpaid, as shown by the testimony herein.

The question which seems to be presented in this case is this:—

Has the party who bought the property, subject to the said deed of trust, any right to have a release of part of the property without further payment of the principal debt, after the debt was all due and the definite renewal and new contract made, reducing the interest to five per cent., and extending the time of payment to November 25, 1907?

What did the parties mean by that extension? The debtor made the extension, and William O. Denison, then interested in the equity in said property, either as trustee or as a stockholder or member of such syndicate, or in both capacities, undertook to bind himself personally to pay the debt, according to the terms of the renewal contract; and one of the provisions of that contract was that the note and deed of trust should remain from that date, August 22, 1904, otherwise unqualified, and in full force, save only the provision as to the time of payment, the interest to be paid, and the privilege of making payment in any sum before maturity.

The ground condemned for the extension of Rhode Island Avenue, 2.10 acres, was released under the terms of the deed of trust, on January 5th, 1900, and the other small tract of .16 of an acre was released February 9, 1904; and neither of these releases bore any relation whatever to the partial payments that had been made on the said debt.

So far as appears from the record, no demand was ever made for any further release on behalf of the syndicate, until February 4th, 1908, when the trustees Leighton and Linton, on behalf of the South Brookland syndicate, notified Messrs. Edmonston and Walker, the trustees in the said deed of trust, of their claim to have a release of a certain part of the land embraced in said deed of trust. This re-

quest or claim for a release was renewed by them on July 13, 1908, when they claimed to have the right to a release of 5.48 acres, and which they selected on each side of Rhode Island Avenue extended, being all the tract lying north of said Avenue, and a strip lying south of said Avenue, and running back 160 feet in depth.

If the syndicate had a right to this release prior to Aug. 22, 1904, it is contended by counsel for the complainant, that the same was lost by the terms of that contract, as well as by the lapse of time wherein the claim was allowed to lie dormant. That the consideration for the extension was not only a forbearance to foreclose, or to sue on the debt; but the same was an advantage to the members of the syndicate in obtaining a reduction of the interest, and therefore that in consideration of these advantages the plain import of the agreement was, that no release should be thereafter claimed without payment of something on the new principal as it then stood.

The creditor at that time held a blanket trust on the whole tract, and no consideration for a release of any part thereof has been shown from that day to this; and if at that time the said deed of trust was in full force, it must follow that it remains in full force, covering the whole tract, at this time. It therefore seems to me that the contention of the defendants, that they are entitled to have a release of a portion of said tract, is without foundation either in equity or law.

There can be no question that the defendants, the members of the syndicate, accepted the new contract, for they have acted under it, and being a contract by which they were benefited, they would be presumed to have accepted it. Neither can there be any question that the new contract took the place of the old, either as a novation, or as a merger of the old contract into the new; and that, therefore, in ascertaining the rights of either party, the new contract must govern, so far as it differs from the old.

The new contract expressly gives the right to pay in any installments, and is silent as to the right of any release. It must therefore be assumed that the right to a release, if it exists at all, must depend on the terms of the original contract; and its right under that is based on the partial payments to be previously made. There being no partial payments since the new contract, the owners of the equity in said property can have no right to demand a partial release under the strict terms of the original contract, notwithstanding partial payments were made previous to the new contract.

The case stands the same as it would have stood had new notes been drawn, the old trust released, and a new deed of trust given, to secure the new principal and interest, on August 22, 1904.

It follows from these conclusions, that the claim of the defendants to have a release of part of the property must be denied, and a foreclosure of the trust decreed.

JOB BARNARD, *Justice*.

Filed March 22, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27940.

NORRIS MACDANIEL, Executor of Mary Macdaniel, Deceased,
Complainant,

vs.

W. HENRY WALKER, Trustee, *et al.*, Defendants.

This cause coming on to be heard upon the bill, answers of the defendants, testimony and the stipulation filed herein, and having been argued by counsel and submitted to and duly considered by the Court, it is this 22d day of March, A. D. 1909, Adjudged, Ordered and Decreed by the Court, that the complainant is entitled to the foreclosure of the deed of trust of November 25, 1892, referred to in the Bill of Complaint and filed as an exhibit with the testimony on behalf of the complainant herein, and that unless the defendants hereto, other than those sued as trustees, pay, or cause to be paid to the complainant, or his solicitor of record, the sum of fourteen thousand seven hundred and eighty-four dollars and forty-four cents (\$14,784.44), with interest thereon from November 25, 1907, together with the costs of this cause to be taxed by the Clerk, within thirty days from the date of this decree, that the real estate situated in the District of Columbia, described in the bill and in said deed of trust as and being part of a tract of land known as "Queensborough" or "Inclosure" described by metes and bounds as follows, Beginning for the same at a stone at North-east corner of lot numbered 11 in the division of part of said tracts as per plat recorded in the Surveyor's Office of the District of Columbia in County Book Governor Shepherd page 151 and running thence with East line of said lot South $35\frac{1}{4}$ degrees East 92.40/100 perches to a stone in outline of tract and thence with said outline North 46 and $\frac{3}{4}$ degrees, East 27 and $\frac{56}{100}$ perches to a stone North 37 and $\frac{1}{4}$ degrees East 20 and $\frac{44}{100}$ perches to the South-west corner of land conveyed to Heider by deed recorded among the land records of said District in Liber 1097 folio 440, thence with said Heider's land North 59 and $\frac{3}{4}$ degrees West 48 and $\frac{30}{100}$ perches, thence North 29 and $\frac{1}{2}$ degrees, West 39 and $\frac{40}{100}$ perches to South side of Brentwood or Bladensburg Road, and thence with South side of said Road South 46 and $\frac{3}{4}$ degrees West 32 and $\frac{88}{100}$ perches, South 59 and $\frac{1}{4}$ degrees, West 11 and $\frac{80}{100}$ perches to the place of beginning less two parcels released from said deed of trust by releases, recorded respectively in Liber No. 2467 folio 408 and Liber No. 2798 folio 169, of said Land Records, the first of said parts of said tract so released being described as follows: All that part of the tract of land known as Inclosure or Queensborough, which is designated as Rhode Island Avenue as proposed to be extended by the Commissioners of

the District of Columbia, as per plat on file in their office and in the Surveyor's Office of said District, said parcel so released lying between the lines of said Rhode Island Avenue as shown on said plat, and the second of the parcels so released being so much of said tract as is described as follows: Beginning at the southeast corner of Galveston Street and Sixteenth Street, extended, thence east twenty feet, more or less, to the Heider line, thence south along the line dividing the Macdaniel tract and the Heider tracts of land 120 feet, more or less, to the north line of Rhode Island Avenue, extended, thence southwest along the line of said Avenue 100 feet, more or less, to the east line of Sixteenth Street, thence north 150 feet, more or less, to the place of beginning, be sold, and that Irving Williamson and Irwin B. Linton, be and they are hereby appointed trustees to make said sale, giving bond in the penalty of twenty thousand dollars; and that the advertisement of said sale be made in the Evening Star newspaper. It is further ordered that the provisions of Equity Rule No. 91 be in all respects complied with.

The defendants Irwin B. Linton and Benjamin F. Leighton, Trustees, defendants in the above entitled cause appeal from the decree passed in said Court on the 22nd day of March, A. D. 1909, in open court to the Court of Appeals of the District of Columbia.

Bond for cost is hereby fixed for \$50 or a deposit of \$50 cash shall be made with the Clerk of this Court.

JOB BARNARD, *Justice*.

Memorandum.

March 25, 1909.—\$50 deposited by appellants in lieu of appeal bond.

31 *Directions to Clerk for Preparation of Transcript of Record.*

Filed April 15, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27940.

NORRIS MACDANIEL, Executor of Mary Macdaniel, Deceased,
Complainant,
vs.

W. HENRY WALKER, Trustee, *et al.*, Defendants.

It is mutually stipulated and agreed by and between Benjamin F. Leighton and Irwin B. Linton, Trustee, the appellants in the above entitled cause, and the appellee, Norris Macdaniel, executor as aforesaid, the said parties acting through their respective solicitors, that the record on the appeal by said appellants to the Court of Appeals, from the final decree passed in this cause on March 22, 1909, shall consist of the following pleadings, documents and agreed statement of facts, to-wit:

First. The Bill of Complaint and the answer of B. F. Leighton and Irwin B. Linton, Trustees, thereto.

Second. The final decree passed in this cause on said March 22, 1909, in which is embraced the notice of appeal; also the opinion of the court, and a note that security for costs was given as required by said decree.

Third. Upon the following agreed statement of facts:

32 The defendants, other than the four trustees, filed an answer similar to that of the defendants, B. F. Leighton and Irwin B. Linton, Trustees, with the exception of Katherine S. Foos, who filed a disclaimer, and to these answers there was a general replication.

Testimony was taken for complainant and stipulation of facts filed in behalf of the defendants.

The deed of trust sought to be foreclosed is dated Nov. 25, 1892, executed by R. W. Walker and wife, securing part of the purchase money of the tract described in the bill being five promissory notes of said Walker, aggregating \$21,000, of even date with said trust, each for the sum of forty-two hundred dollars and payable to the order of Mary Macdaniel, respectively in two, three, four, five and six years after date, with interest, payable semi-annually, at the rate of six per cent. per annum until paid, and said trust contains the following provision:

“With privilege of paying any part of any of said notes at any time before maturity thereof, provided any payment so to be made shall not be less than \$500.00 except where the payment is for the balance due on either of said notes. It being agreed that whenever any part of the principal of said notes shall be paid, the said Redford W. Walker his heirs or assigns, shall be entitled to have release from the operation and effect of these presents such part or parts of the hereinafter described parcel of land as shall bear the same proportion to the whole of said land, then subject to these presents, as the amount paid on said principal shall bear to the whole
33 principal of said debt then remaining unpaid, and further that upon a pro rata payment being made upon all streets, roads or ways of any subdivision made by said Redford W. Walker, his heirs or assigns, and duly approved by the Commissioners for the time being of the District of Columbia, the parties hereto of the second part, shall unite in such subdivision and releases shall be thereafter made according to such subdivision.”

Said deed of trust also contains a provision that upon default being made in the payment of either of said notes, or of any installment of principal or interest thereon as the same shall become due and payable, the trustees therein named shall sell the land and premises therein described, and after paying the expenses thereof to pay whatsoever may then remain unpaid of the said notes and the interest thereon, whether the same shall be due or not, and lastly, to pay the remainder of the proceeds, if any there be, to said Redford W. Walker, his heirs or assigns, and said trust embraces the usual provisions found in deeds of trust in this jurisdiction.

Immediately after the witnessing clause in said trust is the fol-

lowing: "I consent to the provisions of the foregoing deed of trust. Mary Macdaniel."

The first note matured November 28, 1894, and the first payment thereon was made December 7, 1894, when \$3460.52 was paid on account thereof. This was followed February 5, 1895, by payment of \$214.24, and on January 13, 1896, the sum of \$525.24
34 was paid, which settled the first note in full.

The second note became due November 28, 1895, and the first payment on principal thereof was February 5, 1896, amounting to \$273.51, a second payment of \$850.00 was made July 7, 1896, a third of \$200.00 July 15, 1896, and the final payment of \$692.05 on August 25, 1904, leaving a balance due on the second note of \$2184.44, thus making a total payment, in the instalments aforesaid on the principal of the debt of \$6215.56, leaving a balance due of \$14,784.44, with interest from November 25, 1907, up to which date the interest has been fully paid.

There were two releases of part of the real estate described in said deed of trust, executed and delivered in due form of law, as follows, to-wit:

The first bearing date January 25th, 1900, and duly recorded among the land records of the District of Columbia, in Liber No. 2467, at folio 408, *et seq.*, made by the defendants, the said Walker and Edmonston, Trustees, to the City and Suburban Railway of Washington. This release contains the following recital:

"Whereas, a sufficient part of the indebtedness secured by said Deed of Trust having been paid in accordance with the requirements of said Deed of Trust, as has been made to appear to the satisfaction of the said Trustees. And as is evidenced by the signature hereto of the holder of the notes representing said indebtedness."

The second release bears date the ninth day of February,
35 1904, and was made by the said Walker and Exmonston, Trustees, to the then trustees of said Syndicate, Denison and Baldwin. Said release is duly recorded among the land records of the District of Columbia, in Liber No. 2798, at folio No. 169, *et seq.*, and contains the following habendum clause:

"To have and to hold the same, with the appurtenances, unto and to the use of the said Denison and Baldwin, Trustees, and their heirs and assigns forever, fully released and discharged from the effect and operations of said Deed of Trust, a sufficient amount having been paid on the indebtedness secured thereby, as is evidenced by the signature of the holder of the notes, to entitle the said Denison & Baldwin to a release of above described real estate in accordance with the provisions contained in the above mentioned deed of trust."

Both of said releases were signed by Mary Macdaniel, as holder of the notes.

The second of said promissory notes is in the following language and figures, to wit:

\$4200.

WASHINGTON, D. C., November 25, 1892.

"Three years after date I promise to pay to the order of Mary Macdaniel, forty-two hundred dollars, for value received, with inter-

est payable semi-annually at the rate of six per cent. per annum, until paid, with privilege of paying any part of the principal of this note at any time before maturity, provided no payment so to be made, shall be less than \$500. except where the payment is

36 for the balance due on this note.

(Signed)

"REDFORD W. WALKER."

Attached to each of said notes, except the first, is a slip signed by one William O. Denison, as payee, and the said Mary Macdaniel, as holder, the language whereof is similar in all cases, except as describing the period for which the note to which it was so attached originally ran. That attached to the second note is as follows:

"WASHINGTON, D. C., *August 22nd*, 1904.

The time of payment of the note of Redford W. Walker in favor of Mary Macdaniel, payment of which has been and is hereby assumed by William O. Denison, for \$4200, dated November 25th, 1892, payable three years after date, and secured by deed of trust on Part of Quensborough and Inclosure, D. C., is hereby extended to Nov. 25, 1907, with interest at the rate of five per centum, per annum, payable semi-annually.

Said note, and the deed of trust securing the same, are to remain otherwise unqualified and in full force, with the privilege of paying any or all of said note before maturity."

(Signed)

"WM. O. DENISON, *Payee*."

(Signed)

"MARY MACDANIEL, *Holder*."

To each of the three other notes a similar slip is attached, differing only in the particulars above referred to.

On February 4, 1908, the following notice was served on Edmonston & Walker, Trustees under said deed of trust, by the defendants Linton & Leighton, Trustees:

37

"WASHINGTON, D. C., *Feb. 4*, 1908.

Messrs. W. E. Edmonston and W. Henry Walker, Trustees under a certain deed of trust dated November 25th, 1892, and recorded November 26th, 1892, in Liber No. 1760, folio 99, *et seq.*, one of the Land Records of the District of Columbia:

GENTLEMEN: As such trustees as aforesaid, you are hereby notified that one of the notes secured by said deed of trust has been paid in full; and that a partial payment of \$2015.56 has been made on another of said notes. Said deed of trust provides for partial payments and releases in the following language to wit:

"With privilege of paying any part of said notes, at any time before maturity thereof, provided any payment so to be made shall not be less than \$500, except where the payment is for the balance due on either of said notes. It being agreed that the said Redford W. Walker, his heirs or assigns shall be entitled to have released from the operation and effect of these presents, such part or parts of the hereinafter described parcel of land as shall bear the same proportion to the whole of said land, subject to these presents, as the

amount paid on said principal shall bear to the whole principal of said debt then remaining unpaid, and further that upon a pro rata payment being made upon all streets, roads or ways of any subdivision made by said Redford W. Walker, his heirs and assigns and duly approved by the Commissioners for the time being of the District of Columbia, the parties hereto of the second part shall unite in such subdivision and releases shall be thereafter made, according to such subdivision."

The undersigned trustees of the Addition to South Brookland Syndicate, in whom is lodged the legal title to said property, subject to said deed of trust, hereby request you to release the portion of the land embraced in said deed of trust, to which, by virtue of such payments, they, as owners of the legal title, are entitled; and that before proceeding in any way in the execution of said trust, to determine the amount of land to which said trustees are entitled, either by having a survey made for the computation of the same, or in such other way as you may think proper; and that you execute and deliver said release prior to any sale under said deed of trust, or executing the powers relating thereto, conferred upon you by said instrument. The expenses of such release, the undersigned stand ready to pay.

Respectfully yours,
(Signed) "BENJAMIN F. LEIGHTON,
IRWIN B. LINTON,
*Trustees of the Addition to
South Brookland Syndicate.*"

That William P. Richards, the then surveyor of the District of Columbia, made a plat of the tract of land embraced in said deed of trust, showing its outlines, and that said plat which is on file in this case, may be brought into the Court of Appeals by counsel on either side, and used in the argument of this case, by the consent of said Court, without being incorporated into the record. That Rhode Island Avenue, extended and opened since the making of said deed of trust, runs through the north part of said tract, and the part of said tract, lying to the north of and abutting on said Avenue, between it and Brentwood Road, contains two and ninety-one hundredths acres. The smallest of the parcels shown on said plat contains sixteen hundredths of an acre, and is that embraced in the deed of release of February 9, 1904. That the area of the land embraced in the outlines of said Avenue contains two and ten hundredths acres, and is embraced in the deed of release of January 25, 1900. There is marked on said plat a quadrangular tract lying immediately south of said Avenue, and having a frontage thereon of seven hundred and four and sixty-two hundredths feet, and it contains two and fifty-seven hundredths acres. That the area of the land conveyed by said deed, as a whole, was twenty-six and twenty-six hundredths acres, and deducting the two parcels aggregating two and sixteen hundredths acres, released as aforesaid, there now remains still subject to said trust, a plot of ground lying north and south of said Avenue, which

contains twenty-four acres. That the plat so as aforesaid prepared by said Richards, together with distances and computations shown thereon, are true and accurate as ascertained from the records of the Surveyor's Office of this District. The area as to which the defendants Leighton and Linton claim a right to a release is 5,48
40 acres. Complainant is the duly appointed and qualified executor under the will of Mary Macdaniel.

IRVING WILLIAMSON,
Solicitor for Complainant.
BENJ. F. LEIGHTON
IRWIN B. LINTON,
Solicitors for Defendants,
Leighton & Linton, Trustees.

41 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 40 both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27940, in Equity, wherein Norris MacDaniel, Executor, &c. is Complainant and W. Henry Walker, Trustee, *et als.* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of April, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2016. Benjamin F. Leighton *et al.*, appellants, *vs.* Norris MacDaniel, executor &c. Court of Appeals, District of Columbia. Filed Apr. 29, 1909. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED

MAY 6-1910

*Henry W. Hodgson,
Clerk*

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1909.

BENJAMIN F. LEIGHTON AND IRWIN B. LINTON,
TRUSTEES, APPELLANTS,

vs.

NORRIS MACDANIEL, EXECUTOR OF MARY
MACDANIEL, DECEASED.

APPELLANTS' BRIEF.

BENJAMIN F. LEIGHTON,
IRWIN B. LINTON,
Attorneys for Appellants.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1909.

BENJAMIN F. LEIGHTON AND IRWIN B. LINTON,
TRUSTEES, APPELLANTS,

vs.

NORRIS MACDANIEL, EXECUTOR OF MARY
MACDANIEL, DECEASED.

APPELLANTS' BRIEF.

Statement of Case.

Redford W. Walker and wife on November 25, 1892, executed and delivered in due form of law a deed of trust on certain unimproved land situate in the District of Columbia outside of the limits of the city of Washington, called "Queensborough" or "Inclosure," and containing twenty-six and twenty-six hundredths acres. The trustees in said deed of trust were W. Henry Walker and William E. Edmonston. The trust was duly recorded in the land records of the District of Columbia. It was given to secure five promissory notes of the said Redford W. Walker, grantor in said trust, each for the

sum of \$4,200, or a total indebtedness of \$21,000. The notes were of the same date as the deed of trust and payable to the order of Mary Macdaniel, now deceased, in two, three, four, five, and six years after date, with interest thereon payable semi-annually. On December 21, 1892, the said Redford W. Walker and wife conveyed said real estate in fee simple, subject to said deed of trust, to William O. Dennison and George H. Baldwin in trust for such persons as had contributed to the purchase money of said land and premises, with power to subdivide, sell, and convey the same. Said notes were numbered one, two, three, four, and five, respectively. Note number one was paid to the said Mary Macdaniel in her lifetime in full in partial payments on the dates and in the amounts following, to wit:

December 7th, 1894.....	\$3,460.52
February 5th, 1895.....	214.24
January 13th, 1896.....	525.24

The second of said notes was paid in part as follows, to wit:

February 5th, 1896	\$273.51
July 7th, 1896.....	850.00
July 15th, 1896.....	200.00
August 25th, 1904.....	692.05

making an aggregate payment of \$2,015.56, and leaving a balance on said note unpaid of \$2,184.44. Notes numbered three, four, and five are wholly unpaid. The principal of the unpaid notes amounts to the sum of \$14,784.44 with interest from November 25, 1907, at the rate of 5 per cent per annum.

On August 22, 1904, William O. Dennison, one of the trustees of said syndicate entered into an agreement in writing with the said Mary Macdaniel, holder of said notes, for an extension of the time of payment of said

indebtedness and a reduction of the rate of interest thereon. Said agreement is in the following language and figures, to wit:

“WASHINGTON, D. C., *Aug. 22, 1904.*

The time of payment of the note of Redford W. Walker in favor of Mary Macdaniel, payment of which has been and is hereby assumed by William O. Dennison, for \$4,200, dated November 25, 1892, payable three years after date, and secured by a deed of trust on part of “Queensborough” and “Inclosure,” District of Columbia, is hereby extended to November 25, 1907, with interest at the rate of five per centum per annum, payable semi-annually. Said note and the deed of trust securing the same, are to remain otherwise unqualified, and in full force, with the privilege of paying any or all of said note before maturity.

(Signed) WILLIAM O. DENISON, *Payee.*

MARY MACDANIEL, *Holder.*”

Said deed of trust besides the usual provision for releasing said land from the operation and effect of said deed of trust upon the payment of said entire indebtedness, contained also the following special provision, to wit:

“With privilege of paying any part of said notes *at any time before maturity thereof*, provided any payment so to be made shall not be less than \$500.00 except where the payment is for the balance due on either of said notes. It being agreed that whenever any part of the principal of said notes shall be paid the said Redford W. Walker, his heirs or assigns shall be entitled to have released from the operation and effect of these presents such part or parts of the hereinafter described parcel of land as shall bear the same proportion to the whole of the said land, then subject to these presents, as the amount paid on said principal shall bear to the whole principal of said debt then remaining unpaid, and

further that upon a pro rata payment being made upon all streets, roads, or ways of any subdivision made by said Redford W. Walker, his heirs or assigns and duly approved by the Commissioners for the time being of the District of Columbia, the parties hereto of the second part, shall unite in such subdivision, and releases shall be thereafter made according to such subdivision."

The said Mary Macdaniel as holder of said notes in evidence of her consent to the terms and provisions of said deed of trust, signed the same before the witnessing clause. Her consent was evidenced by the following language:

"I consent to the provisions of the foregoing deed of trust. Mary Macdaniel."

On January 5th, 1900, and February 9th, 1904, respectively, the said Walker and Edmonston, trustees under said deed of trust, pursuant to the special provision relating to releases in said trust contained, executed and delivered two releases covering parts or parcels of said land embraced in said trust, aggregating two and sixteen hundredths acres.

Said William O. Dennison having died, Redford W. Walker and eleven other persons exhibited their bill in equity against George H. Baldwin, the surviving trustee of said syndicate, and seven other persons who, with the said parties complainant in said bill, were the persons who had contributed to the purchase of said real estate and were the sole beneficiaries under said deed in trust, and prayed among other things; a substitution of a trustee or trustees in place of said William O. Dennison, deceased, and of said Baldwin, who was out of the jurisdiction and unwilling or unable to act. The case proceeded to a decree whereby on July 17, 1907, the appellants were appointed trustees under said deed in

trust in place and stead of said William O. Dennison, deceased, and of said George H. Baldwin, removed. The said substituted trustees were vested with the same estate and interest in said property with like powers and duties as their predecessors in title. The said appellants as trustees as aforesaid gave notice in writing to the trustees, Walker and Edmonston, that as trustees of said syndicate they were entitled to have and receive a release of part of said tract of land embraced in said deed of trust by reason of the payment of note number one and the partial payment of note number two under the provision for partial releases contained in said deed of trust.

The appellee as executor as aforesaid came into possession as such executor of the unpaid notes secured by said deed of trust to Walker and Edmonston. Not being able otherwise to obtain payment of the same, he directed the trustees under said deed of trust to proceed in the execution of said trust to sell said property still unreleased in accordance with the terms and provisions in said deed of trust contained. Said trustees declined so to do alleging as a ground of their refusal that they had been notified by the appellants, trustees of said syndicate, that they, the appellants, as such trustees were entitled to an additional partial release of said land embraced in said trust from the effect and operation thereof by reason of the payment of note number one and the partial payment of note number two under the provision for partial releases in said trust contained as hereinbefore set forth.

Thereupon the said appellee as such executor as aforesaid exhibited his bill in equity setting up in substance the above recited facts and making the trustees under said deed of trust and the trustees of said syndicate and all the beneficiaries thereunder parties defendant. The bill contained the following prayers: first, for foreclosure

of said deed of trust; second, for an adjudication of the right of said appellants as trustees of said syndicate to a further release of said property; and third, for general relief (Rec., pp. 2 to 7). The appellants answered said bill and admitted all the material averments therein contained, except the averment that the said appellants were not entitled to have or demand a release of any more of the land described in said trust as demanded by them. Said appellants as trustees of said syndicate averred that they as such trustees had the right and it became their duty to demand of defendants, Walker and Edmonston, trustees, under said deed of trust in said complainant's bill set out, a release of part of the land embraced therein in accordance with the terms and provisions of said instrument relating thereto, and that they had the right and it was their duty to make selection of the parts or parcels of the land to be released by said trustees Walker and Edmonston under the provisions of said trust as aforesaid. That pursuant thereto they selected all the land lying north of Rhode Island avenue extended, containing two and ninety-one hundredths acres, and a strip of land lying immediately south of said avenue and abutting thereon, one hundred and sixty feet in depth by the full width of said tract, containing two and fifty-seven hundredths acres. These two pieces lying north and south of Rhode Island avenue extended, contain five and forty-eight hundredths acres, the exact amount which said trustees claim the right to have released.

Evidence was taken by complainant. The case went to hearing. The court below denied the right of appellants as trustees of said syndicate to a release of any part of said land from the operation and effect of said trust by reason of the payment of note number one and the part payment of note number two, and passed a decree directing a sale of all of said real estate described

in said deed of trust not previously released, and appointed trustees in place of said Walker and Edmonston to make the sale. From this decree the appellants have appealed to this court.

Assignment of Error.

The court below erred in holding that the appellants were not entitled to have released any part of the land embraced in said deed of trust and in decreeing a sale before such release was executed and delivered.

ARGUMENT.

The case is to be tried here upon the complainant's bill, appellant's answer and the agreed statement of facts. There is no controverted fact in the case. The validity of the deed of trust is not assailed. The original indebtedness, the amounts and time of payment, the present indebtedness, are all admitted. The amount of land which ought to be released from the operation and effect of said deed of trust is established by a survey and computed by a competent surveyor, if the appellants as trustees of said syndicate are entitled to a release of any part of the land covered by the deed of trust not yet released (Rec., p. 21).

The question is, are the appellants by a proper construction of the special clause relating to releases in said deed of trust contained, and the payments made of note number one and part of note number two, entitled to such release? The language of the provision touching releases reads as follows:

"It being agreed that *whenever any part* of the principal of said notes shall be paid the said Redford W. Walker, his heirs or assigns, shall be entitled to have released from the operation and effect of these presents" a pro rata share of the ground covered by the trust.

The court below held that the word "whenever" as used in said deed of trust meant *whenever before the maturity of the notes partial payments were made* the provision would be effective and the grantor in said trust or his assigns would be then and only then entitled to releases. The Standard Dictionary of the English language gives as the equivalent of the word "whenever" the phrase "at any time," and gives no other equivalent. The Century Dictionary and Encyclopedia gives as its equivalent the phrases, "at whatever time," "at what time soever." Applying the ordinary meaning as thus defined to the word in question the provision would read—

"whenever or at any time before or after the maturity of the notes payments were made as required by the terms and provisions of the trust the owner of the legal title shall be entitled to releases."

Why should not the clause receive this interpretation? The contract providing for the terms and conditions upon which the holder of the legal title should be permitted or privileged to obtain releases is a separate, independent, special provision injected into the body of the deed of trust and assented to by the holder of the notes secured thereby and probably of vital influence in inducing the purchase of the property. It was the purpose of the vendees to subdivide the property, to lay it off into lots and blocks and sell it in small parcels. The power or privilege of obtaining releases from time to time was necessary to the sale of the property and the delivery of a good title thereto. Without it the whole enterprise would have been clogged and hindered, if not defeated. There is nothing in the context of the clause relating to special releases to indicate that the parties to the trust attached to it any other than its usual meaning, nor is there anything in the nature of the subject-matter of the

trust into which the provision is interpolated or the object to be accomplished by that instrument which necessitates other than the usual meaning to be applied to the word "whenever." It is, except for the provision, an ordinary trust, with the power of sale on default in the payment of the indebtedness secured by it, and other provisions such as are usually found in trusts in this jurisdiction (Rec., p. 18). It was necessary to fix some definite time for the indebtedness to mature. Otherwise the power of sale would have been useless and the trustees would have been unable to execute this and other provisions of the trust without the assistance of a court of equity.

The case of *Prout vs. Roby* is in point, and sustains appellant's contention, as to the proper interpretation of the provisions of the trust under consideration. This case went to the Supreme Court from this jurisdiction. The case arose upon a lease for the term of ninety-nine years, renewable for successive terms of that duration, forever. There was a nominal rent reserved of \$25.80, payable at the end of each succeeding year, during the life of the lease. It was stipulated that if at any time the rent should be due and unpaid, for the period of sixty days, and there should be insufficient property upon the premises, whereupon to make the amount due, by levy, the lessor, his heirs or assigns might re-enter and hold the premises, as if the lease had not been executed. There was a further provision that should the lessee, or her heirs or assigns, at any time thereafter pay to the lessor, or his heirs or assigns, the sum of \$430, over and above the rent then due, the lessor, his heirs or assigns, should thereupon execute and deliver to the lessee, or her heirs or assigns, a deed of release for the demised premises. There was default in the payment of the annual rent, and appellant, who was the heir at law of the lessor, re-entered, claiming a forfeiture of the lease. The appellee

who was the complainant below, filed a bill in the court below, asserting the right to purchase the property, under the provisions therefor in said lease. The court held, on this point of the case, that the covenant to repurchase, was an independent covenant.

Justice Swayne, speaking for the court, said:

“If the covenant had been to convey, upon the payment of the purchase money *during the life of the lease*, putting an end to the lease would have destroyed the covenant; but the covenant is to convey *whenever the purchase money should be paid*. In such cases, the conveyance may be demanded at any time, and the existence or non-existence of the lease when the demand is made is immaterial to the rights of the property.

15 Wall., 476.

That the parties to the deed of trust interpreted “whenever” to mean any time before or after the maturity of the notes is evident from what they did. Note No. 1 fell due November 25, 1894; partial payments were made on account of the same December 7, 1894, February 5, 1895, and January 13, 1896. Note No. 2 fell due November 25, 1895; the first partial payment thereon was made February 5, 1896; all of the partial payments on the same were made after the note became due. Appellant’s testatrix, Mary Macdaniel, might have declined to receive partial payments on account of said overdue note, and have demanded its payment in full, with the alternative of a sale under the trust. The moment she accepted a partial payment on an overdue note, that instant the right to a pro rata release under the terms of the trust accrued to the holder of the legal title. The two releases signed by Mary Macdaniel, show that she thus understood her obligation. Note No. 5, secured by said trust, fell due November 25, 1898. On January 25, 1900, and February 9, 1904, with three of said notes wholly unpaid and overdue, and one of said notes, on

which partial payments had been made, long overdue, the trustees under said trust executed and delivered two releases, each of which were signed by the said Mary Macdaniel, and contained a distinct recital, relating to the provision in said deed of trust, under discussion, and were executed pursuant to the right of the legal holder of the title of said property to receive the same, and the obligation on the part of the said Mary Macdaniel to permit the same to be made by the trustees under said trust (Rec., p. 19).

The recital in the first of said releases is in the following language:

“Whereas, a sufficient part of the indebtedness secured by said deed of trust having been paid in accordance with the requirements of said deed of trust, as has been made to appear to the satisfaction of the said trustees; and as is evidenced by the signature hereto of the holder of the notes representing said indebtedness.”

Were the construction to be put upon said clause in said trust of doubtful import or significance, as it is insisted, then the interpretation so put upon said provision by the parties themselves would be controlling.

Consaul vs. Cummings, 24 App. D. C., 36.

The contract of August 22d, 1904, was made for the purpose of obtaining a reduction of interest on the unpaid notes, and an extension of the time of payment thereof, so as to prevent a sale of the property at the pleasure of the holder of the notes, and for no other purpose. It expressly declares that:

“Said note and the deed of trust securing the same are to remain otherwise unqualified, and in full force, with the privilege of paying any or all of said note before maturity.”

It did not operate as a novation. A novation is the equivalent of payment, and would have extinguished the maker's liability, the same as payment (*Lawson on Con-*

tracts, sections 413 and 414, and cases cited). The power of the trustees under the deed of trust to sell the property, would have been extinguished as by payment. Such clearly was not the intention of the parties to that stipulation. The holder of the notes may have thereafter been unable to maintain a suit at law against the maker of the notes, but this would not necessarily have affected the rights of such holder under the trust; such a result not infrequently occurs. The evidence of indebtedness may be barred by the Statute of Limitations, so that the holder of the indebtedness can maintain no suit at law against the party indebted, and yet the unpaid indebtedness would support the trust, unless the latter was also barred by the Statute of Limitations, or was ineffective for other causes.

The stipulation, it is conceived, is not open to the animadversion of being inequitable, put upon it by the learned justice who decided the case below. At the time of the sale, and from thence on to the present, the land was unproductive. The owner received a cash payment of several thousand dollars, at the time of sale; interest at the rate of 6 per cent per annum, from November 25, 1892, to August 22, 1904, a period of nearly twelve years, has been paid to Miss Macdaniel; from the latter date to November 25, 1907, interest has been paid at the rate of 5 per cent per annum. Taxes have been paid on the property during all of these years. With these items in favor of the holder of the indebtedness, can it be said to be unfair for such holder to relinquish his lien upon the property, in proportion to the payment of the indebtedness?

It is respectfully submitted that the decree below should be reversed, and a sale only permitted after a proper adjustment of appellants' rights are made.

BENJAMIN F. LEIGHTON,
IRWIN B. LINTON,

Attorneys for Appellants.

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED.

MAY 6-1919

Henry W. Rodgers
clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1909.

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No. 2016.
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BENJAMIN F. LEIGHTON AND IRWIN B. LINTON,
TRUSTEES, APPELLANTS,

vs.

NORRIS MACDANIEL, EXECUTOR OF MARY
MACDANIEL, DECEASED, APPELLEE.

—
BRIEF FOR APPELLEE.
—

IRVING WILLIAMSON,
Attorney for Appellee.

In the Court of Appeals

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MACDANIEL, DECEASED, APPELLEE.

BRIEF FOR APPELLEE.

Statement of Case.

The bill in this cause sought a foreclosure and sale under a deed of trust, dated November 25, 1892, executed by R. W. Walker and wife to William E. Edmonston and W. Henry Walker, conveying a tract of land containing some twenty-five acres, to secure deferred purchase-money in the sum of \$21,000, evidenced by five notes of even date, each for \$4,200, with 6 per cent interest, payable to the order of Mary Macdaniel, appellee's testatrix, respectively in two, three, four, and five and six years after date.

On December 21, 1892, R. W. Walker and wife conveyed the tract, subject to this trust, to William O. Denison and George H. Baldwin in trust for a syndicate composed of nineteen individuals, all of whom were made defendants to the bill.

Subsequently, by decree of the Supreme Court of the District of Columbia, passed in Equity Cause No. 26,817, the appellants, Benjamin F. Leighton and Irwin B. Linton, were substituted as trustees under the syndicate deed in trust of December 21, 1892, in the place of Denison and Baldwin, and these substituted trustees, together with the trustees under the deed of trust sought to be foreclosed are likewise parties defendants.

There is no dispute as to the amount due, which is conceded to be the sum of \$14,784.44, with interest from November 25, 1907, up to which date the interest has been fully paid, and the only question presented by the appeal is the right of certain of the defendants to the release from the lien of the deed of trust of a portion of the tract thereby conveyed, to wit, 5.48 acres, although the debt is long overdue.

To properly understand this claim a recital of the history of the transaction subsequent to the date, November 25, 1892, of the deed of trust, is necessary, and attention must also be given to a clause in the deed of trust, which will be hereinafter quoted in full.

The first note matured November 28, 1894, but no payment on account of the principal of this, or any of the other notes, was made until December 7, 1894, when \$3,460.52 was paid on account of said first note. This was followed, February 5, 1895, by payment of \$214.24, and on January 13, 1896, the sum of \$525.24 was paid, which settled the first note in full.

The second note was due November 28, 1895, but the first payment on the principal thereof was made February 5, 1896, amounting to \$273.51, a second payment of \$850 was made July 7, 1896, a third payment of \$200, July 15, 1896, and the final payment August 25, 1904, of \$692.05, leaving a balance due on the second note of \$2,184.44.

From this statement it will be seen that no payments

were made before maturity on account of the principal of any of the notes.

The last of the notes matured November 29, 1898, and they remained overdue until August 22, 1904, when by stipulation in writing annexed to each note the rate of interest was reduced to 5 per cent, and the time of payment of all the notes was extended to November 25, 1907.

The terms of this extension will be hereafter more particularly referred to, as they are of much importance in determining the question now to be decided.

On January 5, 1900, with the assent of the payee of the notes, the trustees under the deed of trust released a part of the tract thereby conveyed, the area of the parcel so released being 2.10 acres, and on February 9, 1904, they again released part thereof having an area of 16-100 of an acre.

The provision in the deed of trust with reference to partial payments and releases is as follows:

“With privilege of paying any part of any of said notes at any time before maturity thereof, provided any payment so to be made shall not be less than \$500.00, except where the payment is for the balance due on either of said notes. It being agreed that whenever any part of the principal of said notes shall be paid the said Redford W. Walker, his heirs or assigns, shall be entitled to have released from the operation and effect of these presents such part or parts of the herein-after-described parcel of land as shall bear the same proportion to the whole of the said land then subject to these presents, as the amount paid on said principal shall bear to the whole principal of said debt, then remaining unpaid, and further that upon a pro rata payment being made upon all streets, roads, or ways of any subdivision made by said Redford W. Walker, his heirs or assigns, and duly approved by the Commissioners for the

time being of the District of Columbia, the parties hereto of the second part shall unite in such subdivision, and releases shall be thereafter made according to such subdivision."

It is to be observed that no part of any one of the notes was ever paid before maturity, and that after maturity and the expiration of a considerable period of time during which the notes were simply held as overdue paper and the holder was in the position of ordering a sale at any time, without any demand for any release other than the two above referred to, a new contract was made whereby a new party, namely, William O. Denison, assumed the obligation of maker of the notes, and in consideration of this on August 22, 1904, the rate of interest was reduced one per cent and time of payment extended to November 25, 1907.

Prior to this new arrangement of August 22, 1904, the two releases above referred to, of part of the tract covered by the deed of trust were made with the assent of Mary Macdaniel, and it nowhere appears that any other request or demand was made for a release during the lifetime of said Mary Macdaniel or before February 4, 1908.

The last of the notes was due November 28, 1898, and so the matter stood, the interest only being paid, until August 22, 1904, when the new contract (Rec., p. 20), extending the notes for three years, substituting William O. Denison as payee and reducing the rate of interest to five per centum, was made, and under this new contract the only privilege reserved is that of "paying any or all of said notes before maturity."

After the qualification of the appellee as executor finding it impossible to collect the notes, he directed a sale by the trustees under the deed of trust, but they had previously been served with notice of February 4,

1908 (Rec., p. 20), from the appellants and, refusing to act, the bill in this cause was filed.

The claim of the appellants as to right of release as set forth in their answer (Rec., p. 10), is that they have the right to "make selection of the parts or parcels of land to be released," because of the partial payments made in the amounts and at the dates hereinbefore set forth, and that with this claim as a basis they state in their answer that they have—

"selected all of the land lying north of Rhode Island Avenue, extended, containing 2.91 acres, and a strip lying immediately south of said avenue, and abutting thereon 160 feet in depth, by the full width of said tract, containing 2.57 acres. These two pieces, lying north and south of said Rhode Island avenue, extended, as aforesaid, contain 5.48 acres, the exact amount which said trustees are entitled to have released."

If reference is made to the plat referred to in the stipulation to be found in the record, it will appear that the selection so made by the appellants leaves only the background of the tract, remote from any road or street, out of which the estate of Mary Macdaniel is to make the large amount still due.

ARGUMENT.

As already suggested the only question presented for decision is the right of the parties who owe this debt, it being long overdue, instead of discharging the only duty now resting upon them, namely, the payment of the debt, to have the security diminished to the extent of some six acres, apply the proceeds of this parcel to their own benefit and leave the creditor the remnant of the tract as the means of collecting the debt. It is fair

argument to say that this attitude on the part of those who should pay evidences their belief that the tract will not produce the amount still due, for if the value was there it would be an easy matter to obtain a loan from other parties and carry the incumbrance until a private sale was effected. The position of the defendants, then, is that in the situation of affairs as shown by the record they are to go hence, figuratively speaking, with six acres of the security in their pockets, and leave this estate to bear the loss.

It is respectfully submitted that this claim is unfounded for a number of reasons:

First. Looking to the clause in the deed of trust (Rec., p. 18) which is the foundation for the position taken by the appellants, it is manifest that there is no basis upon which it can be allowed.

The right to a partial release is by the very terms of the deed limited to payments made before maturity. The exact language is, "with privilege of paying any part of any of said notes at any time *before maturity thereof.*" No payments before maturity were ever made, hence the right to a partial release never accrued. The two releases which were actually given were as to the larger parcel the land covered by the opening of Rhode Island avenue and the smaller piece was evidently for the purpose of permitting a sale thereof for the benefit of the syndicate, and it is a significant fact that the dates of these two releases, namely, January 5, 1900, and February 9, 1904, bear no relation in point of time to any payment. For example the nearest partial payment prior in date to the releases was July 15, 1896, nearly four years before the first release, and nearly eight years before the second release.

It may be argued that subsequent payments on account of the notes after their maturity entitled the syndicate to a partial release, because the privilege clause

contains a subsequent paragraph, as follows: "It being agreed that whenever any part of the principal of said notes shall be paid the said Redford W. Walker, his heirs or assigns, shall be entitled to have released," etc., but it is confidently submitted that this language is governed and controlled by what goes before, namely, the privilege of paying before maturity, and it was a right given to the maker of the notes to encourage their liquidation before maturity. Inasmuch as the maker was not bound to pay before each note fell due, if he chose to anticipate payment, he would be rewarded by the right to a proportionate release; but is it to be supposed that the holder of the notes, after maturity, without the payment of a debt then due, under the language used, intended to agree or did by the clause quoted agree to see her security diminished in consequence of payments allowed to be made in driblets at a time, when but for her forbearance the security could have been sold?

At this point the inquiry may be made as to the foundation of the claim of the appellants, trustees, that they have the right, in any event, to select the part or parts to be released. Surely there is nothing in the language of the clause which suggests such a novel power on the part of a debtor. Whenever before was it suggested that a mortgagor making a partial payment, under a clause such as this, had himself the right to select the portion of the security to be released, taking that which has value and leaving a remnant which, by location, is of little worth out of which the mortgagee, if able to do so, might make the balance?

The statement of such a proposition is its answer, but when we look at the wording of the privilege we find that the part to be released is to—

"bear the same proportion to the whole of the said land then subject to these presents as the amount paid on said principal shall bear to the whole principal of said debt then remaining unpaid."

It is certainly not the right of the debtor to select, but the creditor is to be heard in a matter so vital and in respect to which conflicting views may be entertained.

What has been said with respect to the want of power in the syndicate trustees to select the parts to be released, is not to be considered as a concession that there is a right to a partial release at all, for, as already argued, it never existed in this case for the reasons already advanced.

Second. Suppose the right had been given in language which embodied the claim advanced by the appellants, it was abrogated by the new contract of August 22, 1904 (Rec., p. 20). For years prior to that time the debt had been allowed to run as overdue, the interest only being paid, as the last payment on account before that date was July 15, 1896, and it was the privilege of the holder of the notes at any time to order a sale, but the syndicate said to her, in effect, whatever our rights in the past, if you will extend this debt for three years and reduce the rate of interest one per cent, we will give you a new name on the notes and a new agreement simply allowing us to pay before maturity, but without any provision for partial releases.

The only payment after this new contract was August 25, 1904, in the sum of \$692.05, but, as the record shows, no claim for release was made as to that, and none at all until February 4, 1908. The opinion of the learned justice who decided the case below (Rec., p. 12), states the case fully and fairly and the reasons advanced by him as the basis of the conclusion he reached are referred to in support of the contention on the part of the appellee, and need not be repeated here.

Now that the debt, even under the extension, is seventeen months overdue, and the executor is trying to collect, the syndicate is in equity and good conscience estopped from doing any act to diminish the security.

Its sole duty is to pay the debt and in that case it has the right to an entire release.

That the contract claimed by the appellants under the deed of trust, if it ever existed, which is denied, could be changed by the terms of the extension of August 22, 1904, as a matter of law will hardly be questioned.

In *Canal Co. vs. Ray*, 101 U. S., 527, the court said:

“Notwithstanding what was said in some of the old cases, it is now recognized that the terms of the contract under seal may be varied by a subsequent parol agreement. Certainly whatever may have been the rule at law, such is the rule in equity.”

Third. Had the syndicate the right of release in language so plain as to remove all question, such a right by its conduct, by reason of the new contract and by its failure to claim the benefit has been waived.

In *Farlow vs. Ellis*, 15 Gray (Mass.), 231, Shaw, C. J., said:

“Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, he would have enjoyed. It may be proved by express declaration, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive.”

In *Smith vs. Dennie*, 6 Pick. (Mass.), 262; 17 A. M. Dec., 368, a chattel was sold upon condition that the vendee should give an indorsed note, but was delivered without any express reference to the condition, and remained in possession of the vendee eight days, when it was attached by his creditors, the vendor having made no claim during that period either for the note or the

chattel. No reason was assigned for omitting such a claim. The jury found that there was no intention on the part of the vendor to waive the condition. A new trial was granted, the court saying:

“We are of opinion that the verdict is against the evidence, for there was nothing in the case from which an intention at the time, which though not necessary is important, and no call for security until it was forgotten or abandoned, and perhaps, never would have been recurred to if the goods had not been attached.”

This brief on the part of the appellee was necessarily prepared without the benefit of seeing that to be filed on the part of appellant; but it is submitted with confidence that the decree below, which subjected all that is now left of the tract to sale for the satisfaction of the debt, was right and should be affirmed.

IRVING WILLIAMSON,
Attorney for Appellee.

